83-951

Office - Supreme Court, U.S.
FILED
DEC 7 1983
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

DONALD E. PERCY, et al.,

Petitioners,

v.

GERALDINE BUCKHANON, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF
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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

QUESTIONS PRESENTED

I. Where there has been compliance with state law requiring monthly benefit grants to be determined and paid by a specified date, does any injunction entered after that date which purports to require the payment of benefits for a

portion of that month violate the Eleventh Amendment.

II. Whether an unappealed order initially granting preliminary injunctive relief was improperly employed to bar consideration of the State's appellate claim that no benefits should have been awarded for the period subsequent to the date of entry of that injunction.

PARTIES

Petitioners, Donald E. Percy, Bernard J. Stumbras and Kenneth Rentmeester are state officials ("the State") sued individually and in their official capacities with respect to their administration of welfare benefits which must be paid from the state treasury.

Respondents, Geraldine Buckhanon, Melissa Pflueger, Rosetta Bailey, Mary Green and the class they represent are recipients of aid to families with

dependent children ("AFDC") and medical assistance ("MA"). Two other plaintiffs, Community Advocates and Dane County Welfare Rights Alliance, have been dismissed from this action (App. 274). See Buckhanon, 708 F.2d at 1212 (App. 114).

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OPINIONS BELOW

Certiorari is sought to review a decision of the Seventh Circuit Court of Appeals: Buckhanon v. Percy, 708 F.2d 1209 (7th Cir. 1983) (App. 101-138).

The district court issued its initial decision on January 14, 1982. Buckhanon v. Percy, 533 F. Supp. 822 (E.D. Wis. 1982) (App. 139-152). It issued a second decision on June 1, 1982 (App. 253-275). The district court granted a partial stay on September 21, 1982 (App. 276-299).

The seventh circuit stayed the entirety of the district court's decision on October 28, 1982 (App. 300-301), and then issued its judgment on the merits on May 20, 1983 (App. 304-305). It issued another full stay on July 21, 1983 (App. 302-303). Rehearing was denied on September 9, 1983 (App. 306-307).

JURISDICTION

The judgment sought to be reviewed was entered May 20, 1983 (App. 304-305). The State's petition for rehearing was denied September 9, 1983 (App. 306-307). Jurisdiction is conferred on this court by 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISION INVOLVED

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

FEDERAL STATUTE INVOLVED

Interlocutory decisions.

> (a) [T]he courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts ...

granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions ...

28 U.S.C. § 1292.

STATE STATUTES INVOLVED

Aid to families with dependent children.

. . .

(3) . . .

(b) If the county agency finds a person eligible for aid under this section, such agency shall on a form to be prescribed by the department, direct the payment of such aid by order upon the county clerk or county treasurer of the county. Payment of aid shall be made monthly, except that the director of the county agency may, in his discretion for the purpose of protecting the public, direct that the monthly allowance be paid in 2 or more instalments.

Section 49.19, Wis. Stats. (1979-80).

Medical assistance; recipients of social security aids. (1) ELIGIBILITY. (a) The following shall receive medical assistance under this section:

1. Any person included in the grant of aid to families with dependent children.

Section 49.46, Wis. Stats. (1979-80).

STATE ADMINISTRATIVE CODE PROVISION INVOLVED

Payment of aids. All payments to recipients of aid to families with dependent children (including payments on behalf of children in foster homes or a child-caring institution pursuant to s. 49.19(10), Stats.), shall be made under the following provisions:

. . . .

(3) DATE. Payment of assistance shall be made in the month for which the grant of aid is designated, either in the full amount of the monthly allowance or in 2 or more installments. When a single payment is made for the full amount of the monthly allowance, it shall be made not later than the fifth day of the month. When the monthly allowance is made in installments, each installment shall be for equal periods based on a 30-day month. Payment of the first installment shall be made no later than the fifth day of the month and each subsequent installment no later than the

fifth day of each installment period. Payment of an initial allowance may be made subsequent to the fifth day of the month and shall be made within the month. Additional payments made to meet increased budgetary needs may be made subsequent to the fifth day of the month and payments correcting any prior underpayment may be made any time prior to the end of the twelfth month following the month in which such underpayment occurred.

(4) COVERAGE. Initial payment may include the needs to the first of the month in which aid is applied for and eligibility is shown to have existed as of the first of such month; provided, however, that this provision shall not preclude continuing payments when an eligible recipient moves from one county to another nor adjustments when grants of aid are reinstituted after suspension, nor adjustments upon order of the state department of health and social services, division of family services, made in accordance with s. 49.50(8), Stats., nor in any case or similar cases in which a court decision changes the regulation upon which the case was denied, discontinued or the budget of the recipient was improperly computed, resulting in an

> improper reduction in the amount of aid.

Section PW-PA 20.11 Wis. Adm. Code (1980).

STATEMENT OF THE CASE

The case involves the adequacy of AFDC and MA benefit reduction notices and accompanying explanatory material promulgated by the State in an effort to comply with the Omnibus Budget Reconciliation Act (OBRA) of 1981. The explanatory material appears at 533 F. Supp. 841-44 (App. 229-252).

This petition is concerned only with situations where MA eligibility is dependent on AFDC eligibility. Buckhanon, 708 F.2d at 1217 n. 7, or where only AFDC eligibility exists. It is undisputed that all AFDC checks for the month of January had been mailed prior to January 14, 1982. There was no

showing that any class member was receiving installment payments.

The complaint alleged violation of federal constitutional, statutory and regulatory provisions. The district court had federal question jurisdiction under 28 U.S.C. § 1331. See Buckhanon, 533 F. Supp. at 825.

On January 14, 1982, the district court granted preliminary injunctive relief requiring the State to "'reinstate [benefits] to their original level.'" Buckhanon, 533 F. Supp. at 840. On June 1, 1982, in response to an oral motion to clarify, the district court issued orders requiring the State to "pay eligible plaintiffs AFDC benefits for January of 1982 at December 1981 benefits" and to "pay for the medical services received by eligible plaintiffs after January 14, 1982" (App. 275).

Both orders were appealed by the State and respondents cross-appealed from the denial of medical services prior to January 14. On May 20, 1983, the seventh circuit modified the district court's decision, holding that the Eleventh Amendment precluded an award of AFDC benefits for the full month of January and requiring the State to make pro-rata AFDC and MA payments commencing January 14, 1982. Buckhanon, 708 F.2d at 1215-16 (App. 138-139). On appeal, the Seventh Circuit refused to examine any issue other than the effect of the Eleventh Amendment on the district court's award of injunctive relief.

ARGUMENT

I. Where There Has Been Compliance With State Law Requiring Monthly Benefit Grants To Be Determined And Paid By A Specified Date, Any Injunction Entered After That Date Which Purports To Require The Payment Of Benefits For A Portion Of That Month Violates The Eleventh Amendment.

A. The eleventh amendment prohibits any award of benefits when the State's liability for payment has already accrued or where no determination that the benefits sought were wrongfully withheld has been made.

In Edelman v. Jordan, 415 U.S. 651, 664 (1974), this Court held that the Eleventh Amendment precludes "the award of an accrued monetary liability which must be met from the general revenues of the State, absent consent or waiver by the State of its ... immunity ...." This Court also held that, "we will find waiver only where stated 'by the most

express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." Edelman, 415 U.S. at 673. Later decisions made it clear that Edelman does not bar prospective relief, even in certain circumstances where that relief is financial in nature. The key inquiry is whether "the injunction ... looks to the future, not simply to presently compensating victims for conduct and consequences completed in the past." Milliken v. Bradley, 433 U.S. 267, 290 n. 21 (1977). Thus, Milliken reaffirmed the proposition that an award of monetary relief is not permissible when:

> It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower

> time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard.

Edelman, 415 U.S. at 668.

The dividing line for purposes of an Eleventh Amendment analysis is the date that the district court first grants injunctive relief. Fitzpatrick v. Bitzer, 427 U.S. 445, 451 (1976). At that time, there must be a determination that the particular benefits sought were wrongfully withheld: "In Edelman this court held that monetary relief awarded by the District Court to welfare plaintiffs, by reason of wrongful denial of benefits which had occurred previous to the entry of the District Court's determination of their wrongfulness violated the Eleventh Amendment." Id.

Even when wrongfulness has been determined, prospective relief cannot be obtained where such relief constitutes a

monetary award for prior unlawful conduct. See Miener v. State of Mo., 673 F.2d 969 (8th Cir. 1982); Jackson Sawmill Co. v. United States, 580 F.2d 302, 309-10 (8th Cir. 1978), cert. denied, 439 U.S. 1070 (1979); State of Ohio v. Madeline Marie Nursing Homes, 694 F.2d 449, 457 (6th Cir. 1982).

The seventh circuit alluded to these general principles but did not correctly apply them to the facts of this case.

B. The State's liability for all January benefits had already accrued by the time injunctive relief was initially granted; no determination that January benefits were wrongfully withheld was made until the June 1 order was entered.

The State has no quarrel with the seventh circuit's basic premise that the date of entry of an injunction generally constitutes the dividing line from which

a determination must be made as to whether relief is prospective or retroactive. Buckhanon, 708 F.2d at 1215. But, once that dividing line is determined, the initial inquiry which must be made is whether monetary liability for the particular payment sought has already accrued.

In this case, the seventh circuit relied upon three cases--Kimble v. Solomon, 599 F.2d 599 (4th Cir. 1979), cert. denied, 444 U.S. 950 (1980); Vargas v. Trainor, 508 F.2d 485 (7th Cir. 1974), cert. denied, 420 U.S. 1008 (1975) and Coalition for Basic Human Needs v. King, 654 F.2d 838 (1st Cir. 1981)--for the proposition that benefits may be awarded for each day subsequent to the issuance of an injunction.

Despite a vigorous dissent, the majority in Kimble did hold that it was

powerless to make an award of MA benefits for services received prior to the date of the preliminary injunction, and was free to make such an award for services received thereafter. But there is no indication in that case that MA eligibility was determined monthly. Unlike the situation in Kimble, the class members here had to be "person[s] included in the grant of aid to families with dependent children" in order to receive MA for the month of January. Sec. 49.46(1)(a)1., Stats. (1979-80). The district court, however, acted too late to restore any AFDC grants for that month. Those class members who were improperly "included in the [January] grant for aid to families with dependent children" within the meaning of sec. 49.46(1)(a)1., Stats., were thus also

improperly awarded MA benefits for that month.

The reference to Vargas typifies the inconsistent application of the Eleventh Amendment by the seventh circuit to a given set of facts. In Vargas, 508 F.2d at 491, the court said: "We conclude that the entry of a court order or judgment requiring that payments be made divides the past from the prospective for Eleventh Amendment purposes. Accordingly, an order requiring payment of the October deficiencies in issue here would be retroactive in its application." It is possible to speculate, as this panel did, that those statements were not accurate because the Eleventh Amendment was never actually applied; it is more logical to conclude that the Vargas language embodies a correct analysis of the court's inability

to grant relief because Illinois' monetary liability for the entire month of October had already accrued.

Reliance on King was plainly in error. The King court did not award benefits commencing with the date of entry of its injunction. It required payment commencing with the next series of checks due under state law, presumably because Massachusetts' monetary liability for the first series of semi-monthly checks had already accrued.

The concept of accrual is most commonly employed in the area of taxation, where it has been explained in the following fashion:

> Under the accrual method, income is accounted for when the right to receive it comes into being, that is, when all the events which determine the right have occurred. It is not the actual receipt but the right to receive which governs. Expenses are deductible on the accrual basis in

> the year when all the events have occurred which fix the amount of the item and determine the liability of the taxpayer to pay it.

Standard Federal Tax Reports: 1984 U.S. Master Tax Guide (CCH), ¶ 611 at 215. (Emphasis added.) In the Eleventh Amendment context, the concept of accrual means that a state should not be required to pay "bills which are currently due and owing" because "the state will not have an opportunity to change its course of conduct to minimize the cost should it decide not to assume this added cost." Meeker v. Manning, 540 F. Supp. 131, 141, 142 (D. Conn. 1982).

The seventh circuit failed to apprehend the meaning and importance of section PW-PA 20.11(3) Wis. Adm. Code (1980) with respect to the question of whether liability had accrued. In Wisconsin, administrative code provisions

do not merely limit or pertain to the way in which agency business is conducted, and any and all such provisions have the force of law. Johnson v. Misericordia Community Hosp., 97 Wis. 2d 521, 294 N.W.2d 501, 509 (Wis. App. 1980), aff'd, 99 Wis. 2d 708, 301 N.W.2d 156 (1981). Such administrative code provisions therefore determine when the State's monetary liability accrues by defining when the State's legal obligation to make benefit payments arises.

Although the seventh circuit alluded to "numerous circumstances" where benefit payments could lawfully be made after monetary liability had accrued, it found no waiver on the part of the State. Compare Dept. of Health v. Florida Nursing Home Assn., 450 U.S. 147, rehearing denied, 451 U.S. 933 (1981). Consequently, it is immaterial that the

State could lawfully have waived its Eleventh Amendment immunity by making payment at a point in time after injunctive relief was initially granted.

Moreover, the circumstances cited are all irrelevant to this case. The first sentence of section PW-PA 20.11(3) Wis. Adm. Code (1980) relied upon by the seventh circuit refers to "[p]ayment of an initial allowance." The vast majority of class members were already on AFDC and therefore ineligible to receive such an allowance. Eligibility determinations for those few class members who might have been eligible for such an allowance had already been completed prior to January 5, 1982. The court also referred to the first portion of the second sentence of section PW-PA 20.11(3) Wis. Adm. Code (1980), which allows "[a]dditional payments made to meet increased

budgetary needs." This phrase refers to changes in the circumstances of the recipient which justify an increase in the grant. For example, increased work-related expenses or an increase in the number of dependents might justify an additional benefit award. No such circumstances are present here. Reliance was also placed upon the third phrase of section PW-PA 20.11(3) Wis. Adm. Code (1980), which indicates that "payments correcting any prior underpayment may be made any time prior to the end of the twelfth month following the month in which such underpayment occurred." This language was derived from 45 C.F.R. § 233.20(a)(12)(ii)(a) (1980). See Burton v. Department of Health & Social Serv., 103 Wis. 2d 670, 309 N.W.2d 388, 391 (Wis. App. 1981). It was therefore aimed at "correction of underpayments to

current recipients, resulting from administrative error." 45 C.F.R. § 233.20(a)(12)(ii) (1980). Any clericl errors made in this case are irrelevant to an Eleventh Amendment analysis. Finally, section PW-PA 20.11(4) Wis. Adm. Code (1980), refers to situations in which "a court decision changes the regulation ...." That simply is not the case here. None of the administrative code provisions alluded to by the seventh circuit are sufficient to transform a retroactive award into one which is purely prospective.

Even if the preceding analysis could somehow be overcome, the established test was not properly applied. A January 14 order to "reinstate [benefits] to their original level"--after January eligibility had been determined, after the final

date for mailing January checks had passed and after January checks had actually been issued--is not a determination that the withholding of benefits for that month was legally impermissible. It was not until the June 1 orders were issued that the State's obligation to pay January benefits was decided (App. 253-275). No determination of wrongfulness occurred until that decision was made. By that time, the Eleventh Amendment effectively insulated the State from a benefit award of any kind.

II. The Unappealed Order Initially Granting Preliminary Injunctive Relief Was Improperly Employed To Bar Consideration Of The State's Appellate Claim That No Benefits Should Have Been Awarded For The Period Subsequent To The Date Of Entry Of That Injunction.

A. An order modifying an earlier preliminary injunction is appealable as of right.

28 U.S.C. § 1292(a)(1) (1976) permits appeals from "interlocutory orders continuing or modifying injunctions." The purpose of the statute is "to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." Baltimore Contractors v. Bodinger, 348 U.S. 176, 181 (1955).

The proper test for appealability is as follows:

> For an interlocutory order to be appealable under 28

> U.S.C. § 1292(a)(1) (1976) as an order modifying an injunction, two requirements appear to be necessary and must be satisfied: (i) the original or prior order must have been injunctive in character, and (ii) that injunction must have been modified in some respect by the order from which the appeal has been taken.

Hoots v. Com. of Pa., 587 F.2d 1340, 1348 (3rd Cir. 1978). This test applies regardless of whether a motion for modification or a motion for clarification has been filed: "We see no sound reason to suppose that the Congressional judgment as to the importance of immediate review of interlocutory orders refusing to alter or dissolve injunctions does not extend with equal force to a non-hypothetical dispute as to an injunction's breadth, inasmuch as clarification and modification may be virtually indistinguishable." New York Telephone Co. v.

Communications Wkrs. of Amer., 445 F.2d 39, 40 (2d Cir. 1971).

B. Since the orders appealed from modified a preliminary injunction, they were appealable in their entirety as of right.

The seventh circuit premised its decision on the belief that any aspect of the State's appeal which implicated the validity or correctness of the January orders was jurisdictionally barred. Buckhanon, 708 F.2d at 1214. Such a position is untenable. Carried to its logical conclusion, it would mean that an order refusing to dissolve a preliminary injunction could never be successfully appealed because the appellate court would be powerless to overturn the initial issuance of that injunction.

When jurisdiction is at issue, the proper inquiry is whether the order appealed from alters a previously-issued

injunction. If it does, the order is appealable in its entirety. An order which constitutes a broad modification of a preliminary injunction gives rise to a correspondingly broad appeal.

In this case the orders appealed from determined for the first time that the State was required to "pay AFDC benefits for the month of January ... at December ... levels" and to "pay for medical services received after January 14, 1982" (App. 275). Even though certain of its arguments might have called into question statements previously made by the district court in the memorandum decision accompanying the earlier order, the State had a statutory right to argue that it could not lawfully be required to do either of these things.

C. Even if the State had no absolute right to challenge any items addressed by the district court in its initial memorandum decision, the seventh circuit had discretion to entertain such a challenge.

The seventh circuit has indicated to prospective appellants that it will not accept the anamoly of

> an undeviating or uncompromising rejection of any consideration of the propriety of the granting of a preliminary injunction ... [because it] puts the reviewing court in the position of saying that even though there may have been an error ... in granting the injunction, the court cannot look at such matter now but must leave the injunction intact unless changes in the situation requiring modification have occurred subsequent to the granting [of the injunction].

Fern v. Thorp Public School, 532 F.2d 1120, 1129 (7th Cir. 1976). It then proceeded to overturn an unappealed preliminary injunction. See also United

States v. City of Chicago, 534 F.2d 708, 711 (7th Cir. 1976). A similar approach is taken by the third circuit, and cases from each circuit are cited by the other:

> The scope of an appeal from an interlocutory order is not limited to the appealable order alone. An appellate court has the power to review certain otherwise unappealable orders once it has jurisdiction over the case.

Merrell-Nat. Labor., Inc. v. Zenith Labor., Inc., 579 F.2d 786, 791 (3rd Cir. 1978). See also Empire Nat. Bank of Clarksburg v. Penfield Coal & Coke Co., 354 F.2d 873 (3rd Cir. 1966). The third circuit has also said:

> When the issues are ... inextricably intertwined, we are presented with the "special circumstances" previously noted by this Court in which the scope of appellate review of the denial of a motion to dissolve a preliminary injunction

> "reach[es] the underlying injunction."

Cerro Metal Products v. Marshall, 620 F. 2d 964, 973 (3rd Cir. 1980).

The State's liability for benefits subsequent to January 14 cannot be resolved without examining the contents of both decisions made by the district court. The seventh circuit improperly applied a jurisdictional test, rather than exercising the full range of its discretion.

D. The seventh circuit abused its discretion in refusing to permit the State to challenge any aspect of those items addressed by the district court in its initial memorandum decision.

The three reasons given by the seventh circuit for finding an absence of special circumstances which would permit a challenge to items addressed in the earlier memorandum decision were that the

Eleventh Amendment issue could be separated from the notice question, that the State's failure to appeal the preliminary injunction was inexcusable because the district judge had given no indication that the notice question was open to reconsideration and that the State could not establish error with respect to the notice question because law concerning the adequacy of benefit notices is well-settled and was correctly applied.

There is, in fact, a substantial body of law rejecting those decisions cited by the seventh circuit for the proposition that the State's notices were inadequate. See Garrett v. Puett, 557 F. Supp. 9, 13-14 (M.D. Tenn. 1982), aff'd per curiam, 707 F.2d 930 (6th Cir. 1983); Punohu v. Sunn, 666 P.2d 1135 (Hawaii 1983). Cf. LeBeau v. Spirito, 703 F.2d

639, 644 n. 2 (1st Cir. 1983). Relying upon this line of authority, the State specifically requested the seventh circuit to reconsider its earlier decision. Yet, no mention of this request is contained in its decision.

And, it is precisely because the notice question and the Eleventh Amendment question are conceptually severable that the failure to appeal was excusable in this case. The State could hardly be expected to appeal a preliminary injunction which it believed would cost it nothing because of the existence of its Eleventh Amendment immunity. But when the question of whether the initial injunction applied to the award of January benefits was finally resolved, the State suddenly found itself in the position of having to pay millions

of dollars in such benefits (App. 290-291).

The special circumstance presented here is the district court's failure to resolve until June the interrelated questions of whether the initial injunction contemplated an award of January benefits and whether the State would be shielded from any such award by virtue of the existence of its Eleventh Amendment immunity. Because the timing of the district court's orders impinged upon the State's ability to challenge the contents of an adverse order whose financial parameters were not defined until the State's time to appeal had elapsed, issues concerning the earlier memorandum decision should have been examined, rather than ignored.

CONCLUSION

In questions concerning the exercise of federal judicial power over a sovereign state, the danger of arbitrariness is always present because the federal courts themselves determine whether and in what manner such power will be exercised. If a pattern of arbitrariness emerges, a state and its taxpayers may be unfairly and unjustly penalized. The seventh circuit has exhibited no consistency whatsoever in the manner in which it exercises such power. This Court is the final arbiter of such crucial questions of federalism.

A writ of certiorari should issue to the Seventh Circuit Court of Appeals so that this Court may review and ultimately reverse the seventh circuit's decision that the Eleventh Amendment does not bar an award of benefits subsequent to

January 14, 1982, and that the State was precluded from challenging the district court's award of benefits after that date.

Dated at Madison, Wisconsin this 7th day of December, 1983.

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